



STATE OF MAINE
DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS
11 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0011

JOHN ELIAS BALDACCI
GOVERNOR

JOHN R. NICHOLAS
COMMISSIONER

TO: John R. Nicholas, Commissioner
Department of Health and Human Services
221 State Street
11 State House Station
Augusta, ME 04333

In Re: Gentiva Health Services—Disputed Overpayments to Gentiva Health Services

RECOMMENDED DECISION

An administrative hearing was held on May 11, 2005, at Lewiston, Maine in the case of Gentiva Health Services before Michael L. LeBlanc, Administrative Hearing Officer. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services.

CASE BACKGROUND AND ISSUE:

On or about May 14, 2004, the Department of Health and Human Services, Bureau of Medical Services, Surveillance and Utilization Review Unit¹ (the "Department") notified Gentiva Health Services that it intended to sanction Gentiva Health Services by recouping an alleged overpayment of MaineCare benefits in the amount of \$173,534.76. Gentiva Health Services appealed. Pursuant to an Order of Reference dated January 31, 2005, this matter was assigned by James D. Bivins, Esq., Chief Administrative Hearing Officer to the undersigned Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

Was the Department correct when it determined Gentiva Health Services received excess payments for care and services provided under the MaineCare Program and sanctioned them in the amount of \$173,534.76? See, Exhibit HO-3.

APPEARING ON BEHALF OF APPELLANT:

John N. Camperlengo, Esq.
Susanne Cahill, Esq.
Ruth Patzer
Monica Hullinger

APPEARING ON BEHALF OF AGENCY:

Christopher Mann, AAG
Nancy Holt

¹ Now known as Program Integrity.

Carole Kus, RN
Jenny Longley

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1. Rescheduling Notice dated 3/29/05
- HO-2. Notice of Hearing dated 2/3/05
- HO-3. Order of Reference dated 1/31/05
- HO-4. Acknowledgment of Request for Hearing dated 10/25/04
- HO-5. Request for Hearing dated 10/14/04
- HO-6. Hearing Report dated 1/24/05

Department Exhibits:

- DHHS-1. Provider Agreement with Olsten; DHS Olsten-Gentiva Home Health Care License
- DHHS-2. Recoupment Letter to Gentiva Health Services
- DHHS-3. Chapters II and III, Section 96, Private Duty Nursing & Personal Care Services, Maine Medical Assistance Manual; Chapter I, Section 1, General Administrative Policies & Procedures: Section 1.03 – Provider Participation, Section 1.16 – Surveillance, Section 1.19 – Sanctions
- DHHS-4. Gentiva Health Services – Request for Informal Review
- DHHS-5. DHHS Informal Review Acknowledgment
- DHHS-6. DHHS Informal Review Decision
- DHHS-7. Samples of Skilled Nursing Reports/Employee Time Records from Gentiva Health Services, Employee Name: Donna Reed, RN
- DHHS-8. Medical Eligibility Determination dated 2/16/01
- DHHS-9. Medical Eligibility Determination dated 5/4/02
- DHHS-10. Medical Eligibility Determination dated 5/6/03
- DHHS-11. Medical Eligibility Determination dated 4/23/04

RECOMMENDED FINDINGS OF FACT:

1. Notice of these proceedings was given timely and adequately. Gentiva Health Services made timely appeal.
2. Gentiva Health Services provided Private Duty Nursing Services, within the meaning of MaineCare Benefits Manual, Chapter II, Section 96,² to A.J. (D/O/B 1/29/00) during the period April 2001 through April 2004, which is the period at issue.
3. During the period at issue, A.J. was a qualified recipient of Private Duty Nursing and Personal Care Services through the MaineCare Program.

² “Private Duty Nursing Services” are those services which are provided by a registered nurse and/or a licensed practical nurse, in accordance with the Board of Nursing Regulations, under the direction of the client’s physician, to a client in his or her place of residence or outside the client’s residence, when required life activities take the client outside his or her residence (school, preschool, daycare, medical appointments, etc.). ... See, MaineCare Benefits Manual §96.01-3.

4. The private duty nursing services were provided by Donna Reed, a registered nurse who was employed by Gentiva Health Services during the period at issue. It is undisputed that the services provided were required by A.J., that they were authorized, and that Ms. Reed actually provided the services billed to MaineCare.
5. Donna Reed is A.J.'s grandmother.
6. During the period at issue, the Department reimbursed Gentiva Health Services a total of \$173,534.76 for private duty nursing services provided to A.J. by Ms. Reed.
7. The Department has reimbursed to the Federal Medicaid Program approximately two-thirds of the \$173,534.76.

RECOMMENDED DECISION:

The Department **was correct** when it determined Gentiva Health Services received excess payments for care and services provided under the MaineCare Program and sanctioned them in the amount of \$173,534.76.

REASON FOR RECOMMENDATION:

Because the registered nurse who provided the private duty nursing services to A.J., during the period at issue, Ellen Reed is A.J.'s grandmother, those services are not MaineCare reimbursable through the Private Duty Nursing and Personal Care Services Program.

The following services are not reimbursable under this Section:

D. Nursing services when provided by the recipient's husband or wife, natural or adoptive parent, child, or sibling, stepparent, stepchild, stepbrother or stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, grandparent or grandchild, spouse of grandparent or grandchild or any person sharing a common abode as part of a single family unit. See, MaineCare Benefits Manual §96.05(D). Underlining added.

Gentiva Health Services' argued that §96.05(D) should be interpreted as not applying to the services provided by Donna Reed because Ms. Reed provided private duty nursing services and §96.05(D) applies to nursing services. This argument is rejected. Nursing services are interpreted to mean 'services which are provided by a registered nurse and/or a licensed practical nurse, in accordance with the Board of Nursing Regulations, under the direction of the client's physician, to a client.' When nursing services are provided in the client's home, as is the case here, they meet MaineCare's definition of private duty nursing services. Furthermore, since MaineCare Benefits Manual §96: Private Duty Nursing and Personal Care Services does not contain a definition for the term, "nursing services" that differentiates it from its definition of "private duty nursing services," those terms must be interpreted as meaning one and the same.

Gentiva Health Services argues that it understood that the Department had waived the policy prohibiting reimbursement for nursing services provided to A.J. by A.J.'s grandmother. The only evidence provided by Gentiva Health Services to support this understanding is that Ruth Patzer testified that her clinical manager, Gail Lyons told her that she received the information

from Jenny Longley, a Data Control Specialist for the Department during the period at issue. Ms. Longley denies ever providing that advice to anyone. Nor was she authorized by the Department to provide such advice or make such decisions. Although hearsay can be admitted into an administrative hearing record, testimony that, 'This person told that person who told me,' is not "the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs."³ Therefore, the testimony is not credited, leaving no evidence supporting Gentiva Health Services' argument that the Department waived its policy.

Gentiva Health Services also argues that it is unfair for the Department to recoup the \$173,534.76 as an overpayment because, "The State got what it paid for in this case." This is not entirely accurate. The Medicaid Program is jointly funded by State and Federal dollars under Title XIX of the Social Security Act. In Maine the program is known as MaineCare, and must conform to certain Federal regulations to be eligible for Federal matching funds. That is why the Department was required to reimburse the Federal Medicaid Program for the approximate two-thirds of the \$173,534.76 that the Department was not authorized to receive because it was paid out for services not authorized by the MaineCare Program. Succinctly put, the Department paid \$173,534.76 for services that should have only cost the State of Maine approximately \$57,844.92 had Gentiva Health Services not violated MaineCare policy in the provision of those services. Gentiva Health Services is required by MaineCare Benefits Manual Chapter I §1.03(Q) to comply with the requirements of the MaineCare Benefits Manual. It did not do so in billing MaineCare for services provided to A.J. pursuant to §96 that were provided by A.J.'s grandmother. MaineCare Benefits Manual, Chapter I §1.19 provides for the Department to recoup any overpayments made to a provider. It is fair for the Department to recoup such overpayment.

For all the reasons stated above, it is recommended that the Commissioner affirm the Department's Recoupment Notice dated May 14, 2004.

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS WITHIN TWENTY (20) DAYS OF RECEIPT OF THIS RECOMMENDED DECISION. THIS TIME FRAME MAY BE ADJUSTED BY AGREEMENT OF THE PARTIES. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

Dated: June 6, 2005

Signed: _____
Michael L. LeBlanc
Administrative Hearing Officer
Office of Administrative Hearings

³ See, 5 M.R.S.A. §9057(2).

cc: John N. Camperlengo, Esq., Assistant Vice-President, Gentiva Health Services, 3
Huntington Quadrangle, Suite 200S, Melville, NY 11747
Gentiva Health Services, 648 Wilton Road, Farmington, ME 04938
Christopher Mann, AAG, Office of the Attorney General
Marc Fecteau, Program Integrity
Nancy Holt, Program Integrity
Michelle Quintal, Bureau of Medical Services